

and about one month later, the rest of the shares so obtained were similarly dealt with. By the end of 1963, its holding of shares in four other companies were also transferred away.

As Lord Carmont said in *C.I.R. v. Reinhold*⁽⁴⁾ at 392:

"Certain transactions show inherently that they are not investments but incursions into the realm of trade or adventure of that nature. . . . This means that although in certain cases it is important to know whether a venture is isolated or not, that information is really superfluous in many cases where the commodity itself stamps the transaction as a trading venture and the profits and gains are plainly income liable to tax."

I therefore hold that the facts of this case justify the decision of the Special Commissioners. The appeal is dismissed with costs.

Appeal dismissed.

CHEAM SEE LOO BROTHERS v. KONG YOON CHOY & ANOR.

[F.C. (Ong C.J., Gill and Ong Hock Sim F.J.)

March 24, 1973]

[Ipoh — Federal Court Civil Appeal No. 108 of 1972]

Landlord and Tenant — Exposure to penalty, fine or forfeiture — Whether exposure to prosecution sufficient — Discretion of court — Town Boards Enactment (F.M.S. Cap. 137) s. 105 — Control of Rent Act, 1966, s. 16(1)(k).

In this case the respondents, the landlords of certain premises, applied for possession of the premises, the claim being based on section 16(1)(k) of the Control of Rent Act, 1966. It was alleged that the respondents, the tenants, had erected a roof over an open space in the premises and had thereby exposed the respondents to prosecution under the Town Boards Enactment. It appeared that a complaint had been made to the Town Council and a reply had been received that the Council did not propose to take any action on the complaint. An order for possession having been made by the trial judge, the appellants appealed to the Federal Court.

Held, allowing the appeal: (1) for a claim to succeed under section 16(1)(k) of the Control of Rent Act, 1966, exposure to prosecution is not enough. There must be exposure to conviction and there is no exposure to conviction unless facts exist which would support a conviction;

(2) in this case, as the Town Council had decided not to prosecute, paragraph (k) of section 16(1) of the Act was not available to the landlords as a ground for recovering possession.

Case referred to:-

(1) *Hooi Chuk Kwong v. Lim Saw Choo* [1958] M.L.J. 1.

FEDERAL COURT.

T. S. Chiam for the appellants.

Datuk S. P. Seenivasagam for the respondents.

Ong C.J. (delivering judgment of the court): The appellants (or their predecessors) have been tenants of rent-controlled premises No. 16, Bibby Road, Raub, in their personal capacity for over thirty years. They formed a private limited company about 1949-1950

which continued as protected tenants of the premises. The respondents, their landlords, inherited the property from their mother about 20 years ago. The original rent was \$70 per month, later increased to \$110.

About 1962, the appellants spent \$7,000 on repairs, and in 1964 they obtained the respondents' written consent to repair and extend the roof garden at the tenants' own expense. Subsequently, as the first respondent admitted in cross-examination, the landlords asked for a four-fold increase of the monthly rent to \$450, but their demand was not acceded to. In 1967 the respondents discovered that the open space over the kitchen area had been roofed over with corrugated iron and on October 2, 1967 they gave notice through their solicitor to the appellants, complaining of a breach of the building by-laws and demanding the demolition of this roofing. A copy of this letter was sent to the Chairman of the Raub Town Council. As the notice passed unheeded by the appellants, the respondents on December 20, 1967 made a second complaint in writing addressed to the Chairman of the Raub Town Council. The first respondent admitted in evidence that in 1968 a reply was received from the Town Council saying that they would consider the matter and that in 1969 the Town Council, by letter in Malay, further replied stating that the Council did not propose to take any action on the complaint. In the result the appellants were never prosecuted by the Town Council for breach of any building by-law.

On January 18, 1969, however, the respondents gave notice terminating the appellants' tenancy on March 1, 1969 on the ground that breach of the building by-law entitled the landlords to recover vacant possession under the Control of Rent Act, 1966. Action was commenced by writ issued on June 9, 1969, the claim to repossession being based on the provisions of section 16(1)(k) of the Act, which reads:—

"(k) where the tenant or any other person occupying the controlled premises under him has committed a breach of any provision of any written law in force in the Federation relating to local authorities, or of any rule or by-law made thereunder, affecting the premises which exposes the landlord to any penalty, fine or forfeiture, and the court considers that such order or judgment should be made or given;"

On September 15, 1972, the High Court at Raub gave judgment, directing that vacant possession be delivered up to the landlords on or before February 28, 1973. The tenants' appeal was heard and unanimously allowed by us on March 12, 1973. We now give the reasons for our decision.

In his judgment the learned trial judge found as a fact that the roof was put up by the tenants in 1967 without the landlords' consent. He took note, too, of the fact that neither the landlords nor the tenants had been prosecuted by the Town Council for such breach of the building by-law. But to the question whether the tenants by their action had *exposed* their landlords to a fine, his answer was in the affirmative by virtue of the provisions of sub-section (ii) of section 105 of the Town Boards Enactment (Cap. 137). The section [omitting sub-section (iv) which is irrelevant] reads:—

"105.(i) No person shall erect or cause or permit to be erected in any house any partition, compartment, gallery, loft, roof, ceiling or other structure without having previously obtained the consent in writing of the Chairman.

(ii) In every case the owner of the house shall be deemed to have permitted such erection until the contrary is proved.
(iii) Any person who acts in contravention of this section shall be liable to a fine of twenty-five dollars, and to a further fine of ten dollars for each day after conviction during which such erection is allowed to remain."

We fear that in so deciding the learned judge would appear to have disregarded the Court of Appeal decision given by Thomson C.J. in *Hooi Chuk Kwong v. Lim Saw Choo*,⁽¹⁾ on the proper interpretation of the phrase "which exposes the landlord to any penalty, fine or forfeiture" in paragraph (k) of section 13(1) of the Control of Rent Ordinance 1948. There it was held that "exposure to prosecution is not enough. There must be exposure to conviction and there is no exposure to conviction unless facts exist which would support a conviction". The appeal was allowed on this ground which, being the *ratio decidendi* therein, was binding on the High Court. In the instant case the Raub Town Council had decided in 1969 not to prosecute because they were of opinion that there was no breach of the building by-law. Such being the undisputed facts — and no prosecution having arisen during the three subsequent years — the respondents clearly could not in 1972 maintain that they were "exposed" to any penalty, fine or forfeiture. The appellants therefore were protected tenants because paragraph (k) was not available to the landlords as a ground for recovering possession. Even had the Town Council acted wrongly in deciding not to prosecute, it was well within their powers so to act because section 18 of the Town Boards Enactment (Cap. 137) gave the Chairman an absolute discretion to compound offences and the Town Council cannot by mandamus be ordered to prosecute.

It was sufficient on this ground alone for us to hold that the appeal should be allowed and the order for repossession set aside.

It may be added that paragraph (k) of section 16(1) under the Act of 1966 differs from paragraph (k) of section 13(1) in the 1948 Ordinance. Since the latter was replaced by the Ordinance of 1956 and now by the Act of 1966, an order for possession does not necessarily follow merely upon proof of any breach of written law, but the court is required to exercise its discretion in deciding whether or not an order should be made. In the instant case, the fact that there was no breach of by-law had not been taken into account, nor that the appellants, in all respects good and satisfactory tenants, were sought to be evicted on purely technical grounds, whereas the real reason was that they did not consent to pay the exorbitant rent demanded by their landlords.

The appeal was accordingly allowed and the order of the High Court set aside. Taking all the circumstances into consideration we thought no order as to costs would be fair to all parties.

Appeal allowed.

Solicitors: T. S. Chiam & Co.; S. Seenivasagam & Co.

A L. v. COMPTROLLER-GENERAL OF INLAND REVENUE

[A.C.J. — (Chang Min Tat J.) March 28, 1973]

[Penang — Originating Motion No. 2 of 1969]

Income Tax — Land obtained as a gift — Agreement with developing company — Syndicate formed with object of erecting houses on land for sale — Land sold to developing company at price above assessed value — Single Transaction — Whether profits from transaction liable to income tax — Whether agreement establishes a trade or trading in land — Whether adventure in nature of trade.

In this case the appellant had received a piece of land from his father as gift. Subsequently, he wished to sell the land to a developer but as no agreement could be reached as to the price, an agreement was entered whereby the developer, a private limited company, and the appellant formed a syndicate with the object of erecting houses on the land for sale. It was agreed the land valued at \$145,920 was to be regarded as the contribution of the appellant to the syndicate and that after the scheme was completed and the houses sold, the syndicate would pay the sum of \$145,920 to the appellant and also pay to him one-half of the nett profits of the venture. The appellant took no part in the transaction except to be a party to the agreement and to receive an amount which consisted of a sum representing the expressed sale price of the land to the syndicate and a half of the profits, which together came to the price he demanded for the land. The scheme was successful and at the end the appellant received \$145,920 plus \$39,175 representing half the profits.

The Comptroller-General of Inland Revenue treated the sale by the taxpayer to the syndicate as carrying on the trade of dealing in land and he treated the difference of \$46,920 between the price of \$145,920 at which the land was sold and the price of \$99,000 at which the land was valued for purposes of assessing the stamp duty to be paid on the deed of gift, as assessable income, being his profit. The Comptroller-General also raised additional assessment of income tax on the amount of \$39,175 as partnership income from the syndicate's business.

The taxpayer appealed to the Special Commissioners, who overruled the Comptroller-General in respect of the difference of \$46,920. They held that there was no sale of the land but that the value of the land represented the appellant's contribution to the capital of the syndicate. They therefore "cancelled" the assessment of income tax on this sum and from this decision there was no appeal.

The Special Commissioners also held that the sum of \$39,175 was income from the business and therefore liable to tax. The appellant appealed from this decision.

G Held: (1) on the facts of this case the transaction was a sale of property with a provision for an enhanced price and therefore only an adventure in the nature of trade;

(2) as such the profits therefrom were not liable to tax under the provisions of the Income Tax Ordinance, 1947, and therefore the appeal must be allowed.

Cases referred to:-

- H** (1) *Bank of New Zealand v. Simpson* [1900] A.C. 182.
(2) *Martin v. Lowry* 11 T.C. 297.
(3) *E. v. Comptroller-General of Income Tax* [1970] 2 M.L.J. 117.
(4) *Eames v. Stepnell Properties Ltd.* [1967] 1 W.L.R. 593.

CASE STATED.

I I. K. Cheah and Lim Keun Siew for the appellant.
Nik Saghir bin Mohamad Noor (Federal Counsel)
for the respondent.

Chang Min Tat J.: This is an appeal by way of case stated from the deciding order of the Special Commissioners that the sum of \$39,175 purported to